IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 9

UNITED STATES OF AMERICA,

Appellant,

v.

SEALY, INC.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF AMICUS CURIAE OF RESTONIC CORPORATION

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HANNERSMITH-KORTHEYER CO., MILWAUKEE

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Restonic Corporation, by and through its counsel, respectfully appears and files its brief amicus curiae in the above entitled cause. Consent therefor has been given and stipulated to by the parties hereto and is on file herein.

Restonic Corporation has been referred to in the footnote of appellant's brief, page 2, as one of the groups which signed a consent decree agreeing to eliminate territorial restrictions. It is interested in calling the Court's

attention to the reasons why it signed such consent decree so as to dispel any inference of any sort from the signing thereof prejudicial to the argument advanced by the appellee. Restonic is interested in the outcome of this case because a decision adverse to the Government's contention would permit it to apply for the vacation of the consent decree, with some hope of success, the District Court having retained jurisdiction to modify or terminate the provisions thereof.

Restonic is one of the smallest of the six manufacturing groups referred to in the footnote on page 19 of appellant's brief operating under the Sealy-type arrangement. As of December 31, 1965, it consisted of eighteen licensee members located in various parts of the United States. The individual licensee member's annual volume of mattresses and box springs in dollar cost varies from approximately $118,000 to $1,300,000, about three licensee members doing a million dollars or over, four under $250,000, and the others from $250,000 to $600,000. In 1965 the total volume of sales by group members approximated $7,500,000 in mattresses and box springs, approximately 50% to 60% of which represented Restonic trade-marked bedding. At present Restonic licensees cover most of the United States with the exception of the New England and Pacific Northwest areas.[1]

Restonic was organized in 1938 by a group of bedding manufacturers who held licenses to manufacture bedding under certain United States patents issued to Max Marsack and Sam Marsack, of Milwaukee, Wisconsin.

[1] Excerpt from statement of H. E. Dickinson, Vice-President of Restonic Corporation, submitted in connection with hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, Second Session, Pursuant to S. Res. 191, Part 2. Other factual statements hereafter contained are also from that statement.

These manufacturers had been paying royalties to individuals. It was found that great advantages could be gained by organizing these manufacturers into a group with a central office and the adoption of a common trade-mark by which the bedding manufactured under these patents could be offered to the public under such trade-name through a common national advertising program. One of the principal advantages was to place the small bedding manufacturer in a position where he could compete with the large independent manufacturers who featured a trade-mark product in national advertising programs.

A corporation was then organized, presently known as Restonic Corporation, and each of the licensees of the Marsack patents was eligible to membership therein. It was a non-profit corporation. Each of the licensees was required to subscribe to fifteen shares of stock at $10.00 per share. The by-laws provided that upon the withdrawal for any reason of any of the licensees his stock would be redeemed. A central office at Chicago, Illinois, was then opened and an executive was hired.

The costs of running Restonic Corporation and its national advertising program, including other services which were to be rendered by the central organization to the licensees, were to be borne ratably by the licensees according to the exclusive territory assigned to them and the number of mattresses manufactured under the Restonic labels. Since 1960, when exclusive territories were no longer assigned because of the action of the Government against Restonic Corporation, fees paid by the licensees are based on a percentage of sales volume.

The budget of expenses for the organization included the approximate expense for layouts for the national ad-

vertising program and the various services. The annual budget during the past few years for the national advertising program, the incidental expenses, and the other services afforded the licensees, has run on the average of approximately $200,000. The biggest item in the budget is for advertising in nationally circulated periodicals and preparation of advertising displays and materials for the licensees. This item absorbs approximately two-thirds of the contributions by the licensee members.

Restonic's budget for national advertising, and other services, is of such an amount that it would be impractical and uneconomical for the small manufacturer to spend the money required for the functions performed by the licensing organization because the smaller manufacturer operates only in a small area and it would be a waste of money for him to advertise nationally and produce the small quantities required of advertising materials. In fact it would not be financially possible for him to spend the money required for this purpose.

Under Restonic's plan the licensee manufacturer retained complete control over his own manufacturing and distribution, the only requirement of the licensing corporation being that he manufacture the trade-marked product according to specifications. The products sold by him without a label or under his own labels could be sold by him anywhere.

Since such group activity is the essential factor in providing a nationally recognized and advertised product for the small manufacturer member, it is extremely important that the licensee's sales of trade-marked products must be limited to a definite exclusive territory. This is true because he must be encouraged to further the advertising program of the group by local advertising and sales promotion of the national trade-marked product

and develop a demand within his normal trading area. Since he incurs the expenses of the local advertising and sales promotion, he must be given every opportunity to capitalize on such expenditures.

In actual practice the exclusive territories which have been assigned by Restonic did not exceed an area around the manufacturer's plant having in mind the capacity of such manufacturer to service such territory. It can readily be understood that without exclusive territories there is no point in a manufacturer licensee incurring either the licensing fees to his group or advertising and promotional expenses in his own locale. It would be senseless for him to expend large sums of money in the development of the goodwill in the trade-mark and have someone else come into his territory and usurp such goodwill.

In May, 1960, there was an indication, following a Grand Jury hearing at Chicago, that a civil action would be commenced against Restonic Corporation under the Sherman Antitrust Law. The company authorized its attorney, Mr. A. L. Skolnik, of Milwaukee, Wisconsin, to contact the Department of Justice in relation thereto, and after conferences and negotiations the company entered into a consent decree with the Government on May 27, 1960, restraining it generally among other things from allocating, dividing or apportioning territories, markets or cusotmers for the sale of such products. The decree also provided that each Restonic licensee must file with the court its consent to be bound by the decree as a condition to its right to continue as a licensee.

At the time of entering into this consent decree it was believed by the directors of the company that although it and its licensees were not in violation of the Sherman Antitrust Law in letter or spirit, the cost of engaging in

litigation with the Government was way beyond the ability of its licensee members to incur and that it would be better to enter into a consent decree and attempt to live thereunder. However, the decree, pursuant to stipulation, expressly provided that the court retain jurisdiction for the modification or termination of any of the provisions thereof.

Subsequent events, especially in certain areas of the United States where the licensees were close in territory, forcibly indicated that the licensing group's existence was doomed and Restonic Corporation had great difficulty in procuring from its licensees their individual consents to the decree.

Because of this a special meeting of the Board of Directors of Restonic Corporation was held on June 30, 1960, and it was resolved that if by July 15, 1960, a substantially greater number of consents from licensee members to the consent decree was not received than had been received up to that time, that counsel for the company and Mr. Dickinson were to contact the Department of Justice and attempt to procure its consent to vacate the decree of injunction in order to afford the licensee members of the company and the company an opportunity to defend against the charges set forth in the Government's complaint.

On July 18, 1960, Mr. A. L. Skolnik, counsel for the company, sent to Robert Bicks, Esq., Assistant Attorney General, Department of Justice, Washington, D.C., a letter stating that Restonic was compelled to ask for its day in court or for an appointment to discuss vacating the consent decree.

Subsequently Mr. Skolnik and Mr. Dickinson arranged for a conference at Washington in respect to the matter

and pleaded with the representatives from the Department of Justice to vacate such consent decree and give Restonic and its licensees the opportunity to defend the action. The Department of Justice refused to do so.

Since that time it has become increasingly evident that there is no benefit to the licensees if they cannot have exclusive territory within which to develop goodwill in the trade-marked product. Many of Restonic's licensees are already in conflict in seven areas out of the areas in which Restonic labeled merchandise is sold. Over the period since 1960 several of the licensees resigned and it has been difficult to get new ones. It is only because of the hope that the Sealy litigation now before this Court will be decided favorably to the groups generally that Restonic is continuing against such odds.

Restonic at no time conceded the correctness of the Government's position that assigning exclusive territories was per se violative of the Sherman Antitrust Act. Being one of the smallest of the six groups involved it could not take on the enormous expense of defending against the Government's position and had to be content to stand on the sidelines while the bigger of the groups involved would litigate the question.

We adopt and advance all of the arguments of the appellee on the proposition that assigning exclusive territories is not per se violative of the Sherman Antitrust Act.

Respectfully submitted,

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